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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell Mobile Systems, Inc.	)	File No. 97-31
	)	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments	)	

To: The Commission

REPLY COMMENTS
OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard") hereby submits its reply comments in response to Commission's public notice in the above-referenced matter and the comments filed in response thereto.[1/]

I. INTRODUCTION

As the comments filed in response to the Public Notice demonstrate, the Commission should grant the Petition. State court claims challenging the rates prescribed by Commercial Mobile Radio Service ("CMRS") providers are prohibited by section 332 of the Communications

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1/ Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments Filed by Southwestern Bell Mobile Systems," DA 97-2464,, rel. Nov. 24, 1997 (the "Public Notice"). By a later order, the date for filing comments in this matter was extended from December 24, 1997 to January 7, 1998. *See* Southwestern Bell Mobile Systems, *Order,* File No. 97-31, DA 97-2674 (Wireless Tel. Bur. Dec. 22, 1997). The Petition for a Declaratory Ruling shall be referred to herein as the "Petition."

Act.[2/] Except under certain specific circumstances, none of which exist in the present case, section 332 preempts *all* state-level regulation of CMRS rates, regardless of whether the regulatory authority is granted via state utility statutes, other statutes or the common law. As several commenters note, the state challenges to the rates charged by CMRS providers, including charges for incoming calls and for whole-minute increments, are preempted under section 332 because they effectively seek rate regulation of CMRS providers' services.[3/]

Moreover, despite claims that Southwestern Bell Mobile Systems ("SBMS") failed to disclose to customers its practice of billing in one-minute increments, these practices are not "hidden" or "sprung" on unsuspecting customers, but rather are universal, long-standing telecommunications industry practices and are part of most, if not all, carriers' basic terms of service. If the Commission does not grant the Petition, Vanguard and hosts of other CMRS providers will be subject to attempts to change the terms under which service is offered, long after the costs of providing that service have been incurred. Thus, it is particularly important for the Commission to confirm that the rate regulation sought in these suits is preempted.

II. PLAINTIFF'S CLAIMS CONSTITUTE STATE CHALLENGES TO SBMS' RATES

While the commenters opposing SBMS' Petition suggest that their causes of action are based on breach of contract and consumer protection violations, it is evident that these claims, while cloaked in the language of "breach of contract" and "disclosure violation," are direct

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2/ 47 U.S.C. § 332.

3/ *See* 360° Comments at 4; AirTouch Comments at 2-3; Ameritech Comments at 4; CTIA Comments at 9; GTE Comments at 7; Omnipoint at 4; Sprint PCS Comments at 8-7.

challenges to the rate practices of SBMS and other wireless providers.[4/] Thus, they are barred by section 332 of the Communications Act. Indeed, as several commenters explain, the term "rates charged" in section 332(c)(3) of the Act covers charging in whole-minute increments and charging for incoming calls. According to AirTouch, the "practices challenged in the proceedings described in the Petition are on their face rate practices of CMRS carriers. In particular, rounding charges to per-minute (or smaller or larger) increments, or charging for incoming calls are simply methods by which carriers determine how prices will be translated into revenues that recover their costs."[5/] While it may be true that the court has been asked to review a rate provision that is contained in a contract, the essence of the claims against SBMS centers on whether the rates charged by SBMS are just and reasonable – a determination the court is not authorized to make.[6/]

The Illinois Plaintiffs also argue that, because other CMRS providers have been subjected to similar suits in other jurisdictions and have entered into global settlement agreements, the Plaintiffs' current legal actions in state court "best serve to protect the interests of . . . consumers, and [] the state court forum is the most practical and most suitable for the

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4/ Comments of the Illinois Plaintiffs at 7-8; *see also* Comments of the Smilow Plaintiffs at 1-2 (alleging that SBMS' conduct of charging for incoming calls and charging in whole minute increments violates contracts with its customers).

5/ AirTouch Comments at 2.

6/ The present case is distinguishable from disputes in which a plaintiff sues to enforce the specific terms of a contract, such as an instance when a customer has been charged $0.85 per minute on her bill and sues to enforce the terms of the contract containing a rate per minute of $0.75. Here, plaintiffs are seeking to have the courts change the way wireless rates are calculated regardless of the language of the contracts.

legal claims asserted against Petitioner."[7/] This is irrelevant. Parties settle suits for many reasons, such as avoiding unnecessary legal expenses, even when the underlying claims are not meritorious.[8/] Regardless of the settlements, section 332 prohibits state CMRS rate regulation absent Commission authorization. Only the Commission has the authority to decide whether a state will be permitted to engage in rate regulation and such a decision can be made only through the mechanisms described in section 332(c)(3).[9/] Because the Commission has not authorized any state to engage in CMRS rate regulation at this time, no state is authorized to do so.[10/]

7/ Comments of the Illinois Plaintiffs at 12.

8/ Indeed, it is not uncommon for the plaintiffs' counsel to be the primary beneficiary of settlements of class action suits such as those at issue here.

9/ Under Section 332(c)(3), states may regulate CMRS rates only under two circumstances. First, states that regulated CMRS rates at the time Section 332 was amended were permitted to petition the Commission for authority to continue that regulation. 47 U.S.C. § 332(c)(3)(B). Although several states filed such petitions, all of those requests were denied. Second, the Commission may grant a state petition for authority to regulate the rates of CMRS providers if the state demonstrates that market conditions fail to protect consumers from unjust, unreasonable or discriminatory rates *and* that CMRS provides a substitute for "a substantial portion" of the landline service in the State. 47 U.S.C. § 332(c)(3)(A). No such petition has been filed, let alone granted, since the passage of the 1993 Budget Act. In other words, the Commission never has exercised its power under Section 332 to permit states to regulate CMRS rates.

10/ The Illinois Plaintiffs allege that the they filed their lawsuit against SBMS to redress the Petitioner's deceptive practice of failing to adequately disclose to its customers its practice of billing in one minute increments. However, the standard practice for carriers throughout the telecommunications industry is to charge in minute increments, *i.e.*, charges beginning the moment the minute starts. This practice has been followed since the time per minute billing began. To allege deceit based on practices that are industry-wide and made known to customers with every phone bill, is absurd.

any authority to regulate" CMRS rates.[15/] Rather, if the regulation affects rates, it must be considered a rate regulation.

This analysis is confirmed by the legislative history of section 332, which sets forth the limited range of activities that are available to the states, and none of which provide the states any power over the rates charged by CMRS providers.[16/] Indeed the list of terms and conditions demonstrates that rate elements, including the determination of which service to charge for and how much to charge, do not fit within the scope of a state's lawful regulatory authority. Rather the matters that are left within the states' jurisdiction fall within a limited class of police powers, not their general regulatory powers. Moreover, the notion that any of the practices described in the class action suits are billing practices is untenable. Billing practices, at most, relate to the actual mechanics of billing, such as whether bill is accurate and whether the customer is given adequate time to pay the charges. Especially in light of the express preemption of state rate regulation, it is impossible to include any element of rate determination within the scope of the term.

IV. SECTION 414 PRESERVES REMEDIES RATHER THAN SUBSTANTIVE CAUSES OF ACTION

The Illinois Plaintiffs allege that the savings clause in section 414 of the Communications Act "preserves state law 'causes of action for breaches of duties distinguishable from those

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15/ 47 U.S.C. § 332(c)(3)(A).

16/ H.R. Rep. No. 111, 103rd Cong. 1st Sess. at 261 (customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues; transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis).

created under the Act, as in the case of a contract claim.'"[17] This reading of section 414 misinterprets the plain language of section 414, which preserves the right to pursue common law and statutory *remedies*.[18]

It is a fundamental principal of law that one must have a "right" in order to seek to enforce a remedy for a violation of that right. Such is not the case for the Plaintiffs in the present proceeding. As described above, Plaintiffs do not have a right to pursue their state law claims challenging the Petitioner's rates because section 332 directly prevents the court from rendering a decision on such claims. In such instances, where state court determinations of the plaintiffs' claims would directly conflict with a provision of the Communications Act, section 414 is inapplicable.[19]

V. STATE COURT DAMAGES AWARDS OR INJUNCTIVE RELIEF WOULD CONSTITUTE IMPERMISSIBLE RATE REGULATION

Plaintiffs assert that an award of damages in the present case would not require the court to determine the reasonableness of SBMS' rates. Specifically, the Smilow Plaintiffs assert that

> [i]n order to determine damages in the Smilow Action, the court would first have to determine the difference between the time for which Southwestern Bell could charge pursuant to the terms of the Contract and the time for which Southwestern Bell actually charged its customers. The monetary damages to be awarded the plaintiff and the

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17/ Comments of the Illinois Plaintiffs at 6 (citations omitted).

18/ 47 U.S.C. § 414 ("[n]othing is this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this Act are in addition to such remedies.").

19/ The Smilow Plaintiffs argue that the "filed tariff [sic] doctrine" is irrelevant to the instant proceedings. However, some jurisdictions do require that CMRS providers file "terms and conditions" tariffs. In these states, the terms and conditions tariff would control. Thus, the contention that the "filed rate doctrine" does not apply is incorrect.

> members of the class would be the amount of money Southwestern Bell charged Smilow and the members of the class for that overbilled time at the "rates" in effect when those calls were made. In awarding these damages, the court would have no need to consider the "reasonableness" of the rates that Southwestern Bell has charged. . . .[20/]

This argument, however, fails to recognize that, for the court to award damages or injunctive relief, the court first must determine the lawfulness of the rates charged by SBMS. Thus, "if state courts were to decide that a rate based on per-minute units is unlawful, those courts inevitably would determine a reasonable unit of measure under state law. To calculate damages or tailor an appropriate injunction, a court would have to decide how CMRS providers may assess rates, and thus what unit of measurement for service charges was reasonable."[21/]

The Plaintiffs' argument also fails to consider that an award of damages or injunctive relief necessarily would require SBMS to alter its rates. Such a mandated rate change by the court would constitute a direct violation of section 332. Indeed, according to Sprint PCS, "[s]uch judicial action, in addition to encroaching on the authority of the Commission, would have the same effect as legislation. Accordingly, any judicial declaration that per-minute rates are unlawful and any attendant award of damages or entry of injunction, would constitute prohibited rate regulation."[22/] Thus, any action by a state court on the Plaintiffs' claims, whether in the form of injunctive relief or an award of damages, necessarily involves a judicial determination of the reasonableness of CMRS rates and therefore would constitute a form of state rate regulation in direct violation of section 332.

20/ Comments of the Smilow Plaintiffs at 15.

21/ Sprint PCS Comments at 8 (footnote omitted).

22/ *Id.*

VI. CONCLUSION

For the foregoing reasons, Vanguard Cellular Systems, Inc. respectfully requests that the Commission act in accordance with these comments.

Respectfully submitted,

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January 23, 1998

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 23rd day of January, 1998, a copy of the foregoing "Reply Comments of Vanguard Cellular Systems, Inc." was sent by first-class mail, postage prepaid, to the following:

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